

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 26, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2989

Cir. Ct. No. 2013CV90

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BUSHMAN FARMS, INC.,

PLAINTIFF-APPELLANT,

V.

DAIRYLAND REAL ESTATE, LLC,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order¹ of the circuit court for Wood County: TODD P. WOLF, Judge. *Affirmed.*

¹ In its notice of appeal, Bushman indicated that it was appealing the circuit court's judgment dismissing Bushman's complaint and the court's order denying Bushman's motion for reconsideration. On appeal Bushman does not address the court's order denying the motion for reconsideration, and therefore we do not consider this issue in this appeal. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review inadequately briefed issues).

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. This appeal arises out of Bushman Farms, Inc.’s allegations that Dairyland Real Estate, LLC, did not perform under the terms of a listing contract entered into by the parties, and therefore, Dairyland is not entitled to retain the commission paid by Bushman after the successful sale of Bushman’s land. Bushman’s argument on appeal is that the circuit court erred by determining that Dairyland is entitled to retain the commission because Dairyland did not perform under a strict construction of the listing contract. For the reasons that follow, we reject this argument and affirm.

BACKGROUND

¶2 There was a bench trial in this case. The following facts are taken from the circuit court’s findings of fact and evidence taken from the record viewed in a light that supports the court’s decision.

¶3 On January 4, 2012, Bushman and Dairyland entered into a listing contract for the sale of property owned by Bushman. The listing contract was completed on behalf of Dairyland by Joseph Bradley, a licensed broker and owner of Dairyland. The listing contract included two addenda,² Addendum A and Addendum B, which Bradley also drafted. Under the terms of both addenda, when read together, Dairyland would earn a commission only “upon successful closing and full payment if property is sold to the buyer[s] listed in addendum [sic] B,”

² The documents that we refer to as “addenda,” are actually titled as “WB-42 AMENDMENT TO LISTING CONTRACT.” The first amendment has no further designation, but the second amendment is designated addendum on line 11 as “Addenda ‘B’.” For ease of reference we refer to the first amendment as “Addendum A” and refer to the second amendment in keeping with its designation in the amendment as “Addendum B.”

which included a person named Goedhart Westers. Addendum A named Bushman's "protected buyers," meaning those for whom Dairyland would not receive a commission.

¶4 Westers submitted an offer to purchase Bushman's property. Bushman's attorney, Michael Salm, produced a second draft after concerns arose regarding the first. Hereafter, we refer only to the second draft of the offer to purchase.

¶5 On January 30, 2012, the offer to purchase was signed by Bushman, and Westers signed the offer the next day. The offer to purchase named Westers as the buyer, and included an addendum that allowed Westers to "assign his rights and obligations under [the offer to purchase] to a limited liability company." Under the assignment of rights provision of the offer to purchase, even if Westers assigned his right to purchase, he was obligated to buy the property if the assignee did not perform. After the offer to purchase was signed, the matter was turned over to Westers' and Bushman's attorneys to handle additional matters and the closing of the deal. From this point forward, Dairyland was not involved in any part of the real estate transaction, including the closing, and it received no communications regarding the transaction from the buyer's and seller's attorneys.

¶6 Prior to the closing, Westers formed Greenwood Acres, LLC, and assigned to Greenwood Acres his rights as the buyer of the farm. Approximately two weeks prior to the closing, Bushman attorney Michael Salm met with Alan Bushman, the company's president, and reviewed the closing statement, the warranty deed, and other pertinent documents. Greenwood Acres was prominently identified as the buyer near the top of the first page of the closing statement, and there were two lines on the third page of the closing statement

indicating that Greenwood Acres was the buyer. Also on the closing statement was a commission line indicating that a commission would be paid to Dairyland. Although the closing statement and the warranty deed clearly stated that Greenwood Acres was going to be the buyer, Bushman did not object to the change in buyers at that time nor at any time up to and including the day of closing. Bushman never suggested at any time before closing that Dairyland was not entitled to receive a commission from the sale of the farm.

¶7 At the closing, an agent for Dairyland was directed to wait in the waiting room, and the closing occurred in a separate room. After the closing papers were executed, a commission check was given to Dairyland's agent. Three months later, Bushman demanded that Dairyland reimburse the commission that Bushman paid Dairyland on the ground that the agent who accepted the commission check was unlicensed at the time.

¶8 When Dairyland refused Bushman's demand to return the commission, Bushman filed this lawsuit against Dairyland alleging that Dairyland breached the terms of the two addenda related to selling to Westers or the other person named in Addendum B.³ Dairyland responded with several affirmative defenses, including that Bushman had waived any right it might have to withhold the commission, and sought summary judgment. The circuit court denied summary judgment, concluding that there was a dispute over material facts that could only be resolved by a trial. Although not alleged in Bushman's complaint, an issue arose before trial as to whether Bushman or Dairyland breached the

³ Bushman made a second claim based on the unlicensed broker issue, but this was dismissed, and Bushman does not raise the issue on appeal; therefore, we do not address the topic again.

implied duty of good faith and fair dealing that is inherent in all contracts. The case was tried to the circuit court, after which the court dismissed all of Bushman's claims.

¶9 In dismissing Bushman's claims, the circuit court concluded that Bushman breached its implied duty of good faith and fair dealing to Dairyland because Bushman did not inform Dairyland before closing that the buyer would be changing from Westers to Greenwood Acres. In contrast, the court concluded that Dairyland did not have a duty of good faith to determine if the buyer at closing was on the protected buyer list because Dairyland was never informed by Bushman or Westers that the buyer would be changing to Greenwood Acres. The court determined that Dairyland fully performed its contractual duties by bringing forward a buyer (Westers) who was on Addendum B and not on the protected buyers list. For these reasons, the court held that Bushman "duly and properly paid" the commission to Dairyland. Bushman appeals.

DISCUSSION

¶10 On appeal, Bushman argues that Dairyland should be required to return the commission because the farm land was not sold to Westers but to Greenwood Acres. As we now explain, we conclude that Bushman waived its right to deny payment of the commission to Dairyland.

¶11 The parties dispute whether waiver applies under the facts of this case. Bushman maintains that the issue of waiver is not properly before this court because the circuit court did not base its decision on waiver. However, Bushman does not explain why we may not affirm on this legal theory merely because it was not relied upon by the circuit court. *See State v. Earl*, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755 (we may affirm on different grounds than those

relied upon by the circuit court). Bushman also briefly attempts to suggest, in fragmentary arguments that we reference below, that waiver does not apply.⁴ For the following reasons, we agree with Dairyland that the facts show that Bushman's conduct met the criteria for waiver.

¶12 Wisconsin case law “has consistently maintained” that waiver is “the intentional relinquishment of a known right.” *Brunton v. Nuvelt Credit Corp.*, 2010 WI 50, ¶37 & n.11, 325 Wis. 2d 135, 785 N.W.2d 302 (quoting another source) (collecting authority). This requires “actual knowledge of the right being waived.” *Id.*, ¶36. The court explained further in *Brunton*:

Intentional relinquishment may be demonstrated by an express statement or by conduct. Intentional relinquishment by conduct occurs when a party's conduct is “so inconsistent with a purpose to stand upon one's rights as to leave no room for a reasonable inference to the contrary.” Stated differently, a party intentionally relinquishes a known right by affirmative acts unambiguously demonstrating that his conduct is intentionally undertaken and meant to give up the right [at issue].

Id., ¶38 (citations omitted; quoting another source).

⁴ Although its briefing is unclear, Bushman apparently intends to argue that waiver could not apply because Dairyland breached its fiduciary duty to Bushman in one or more ways, but Bushman does not develop that counterintuitive argument with support to legal authority, and therefore, we do not consider it. See *Pettit*, 171 Wis. 2d at 646 (we may decline to review inadequately briefed issues).

Bushman also addresses the circuit court's determination that Bushman breached the implied duty of good faith and fair dealing and that the court's decision “rewrote the listing contract.” We do not address these arguments because of our dispositive conclusion that the record conclusively supports affirming the circuit court on the ground that Bushman waived its right to object to Dairyland's commission, including the objection that Dairyland failed to fulfill the requirements of Addendum B.

¶13 Applying these principles here to the facts recited above, the record easily supports the conclusion that, as Dairyland argues on appeal, Bushman intentionally relinquished its known right to deny the commission. It is self-evident that Bushman had actual knowledge of all pertinent circumstances under which the commission would or would not come due, and its conduct before, during, and after the sales transaction was “so inconsistent with a purpose to” withhold or deny payment “as to leave no room for a reasonable inference to the contrary.”

¶14 Recapping briefly, Bushman was involved in the negotiations that led to the drafting of the listing contract and the two addenda, including the addendum that limited the circumstances under which Dairyland would earn a commission. Bushman does not seriously dispute that it knew prior to and at the closing that the buyer was Greenwood Acres and not Westers. The closing statement, which Bushman reviewed with its attorney and signed, listed Dairyland as the broker to whom a commission was to be paid and the amount Dairyland would receive. Although Bushman knew or should have known that Dairyland was entitled to a commission only if the farm land was sold to an individual listed on Addendum B, and that Greenwood Acres was not one of the listed buyers on Addendum B, Bushman nevertheless proceeded to pay Dairyland a commission after the farm was sold to Greenwood Acres.

¶15 Bushman has little to say that is pertinent to the waiver topic and certainly nothing that is persuasive. In its separate reply to an amicus brief filed by the Wisconsin Realtors Association, Bushman appears to intend to argue that the record establishes that the attorney for Bushman attempted to identify the members of Greenwood Acres leading up to the closing but discovered little concrete information about the LLC’s members. But even assuming these general

points to be true, we fail to see how that helps to resolve the waiver issue under the standards we summarized above. Regarding the difference between Westers-as-buyer and Greenwood Acres-as-buyer, as that difference might affect the obligation of Bushman to pay a commission, all Bushman had to do was to compare the listing contract to the closing papers, both of which were in its possession at all pertinent times.

CONCLUSION

¶16 For the reasons stated, we affirm the circuit court's decision that Dairyland is entitled to retain the commission that Bushman paid after the closing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

